FOR ARGUMENT.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1335

VILLAGE OF SCHAUMBURG,
Petitioner,

vs.

CITIZENS FOR A BETTER ENVIRONMENT, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITIONER'S REPLY BRIEF.

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STATEMENT OF THE CASE.

The respondents in their brief have attempted to add to the statement of the case which appeared in our original brief. In so doing, they have twisted the pleadings which form the basis for the trial court's erroneous summary judgment. For example, they rely on paragraph 3 of the amended complaint to describe the nature of the respondents' activities. In our answer, we alleged lack of knowledge sufficient to form a belief as to the truth of the allegations. The character of the respondents' activities thus remains a matter of proof (A-26). We conceded that the respondents employed canvassers who solicit funds. The

only issue in this case is the validity of the 75% requirement; even if CBE was a not-for-profit corporation that distributed literature on environmental questions, answered questions and solicited contributions, such fact would not conclusively determine the validity of the 75% requirement.

Reliance on Hoellwarth's affidavit is misplaced. The affidavit does nothing but restate the allegations of the complaint and is composed largely of mere conclusions. The only substantive question before this court is whether a 75% requirement, as applied to this specific organization, impinges upon First Amendment rights. Such a question requires an evidentiary hearing. The procedural question is whether a controverted issue of fact requires a trial rather than a summary judgment.

The respondents also refer the court to a supplemental affidavit prepared by a Kenneth R. Arway. This affidavit was not part of the pleadings upon which the motion for summary judgment was granted. Instead, it was attached to a reply memorandum. The so-called description of CBE's in-house research staff consists of one sentence in Mr. Arway's affidavit. We suggest that an affidavit attached to a memorandum of law is not properly before the court on a motion for summary judgment. We further suggest that the respondents' argument as to its extensive research staff is simply not supported by the record.

We do not know the nature of the research, the amount of time each purported staff member devotes to the organization, or what, in fact, the "in-house research staff" actually does. To assert that certain audits purportedly show a percentage of income spent on fund raising and another percentage on administration is absolutely meaningless without having at hand the audits in question and an opportunity to cross-examine the auditors who prepared the reports. Mr. Arway did not purport to be an auditor or a member of the research staff. The affidavit dated December 23, 1977 was clearly an afterthought to the motion of summary judgment which had been filed on December 7, 1977.

The Village offered affirmative defenses to the effect that CBE was primarily devoted to raising funds for the benefit and salaries of its employees and that its charitable purposes were negligible (A 33). The respondents argue that no proof of these allegations was ever presented. The granting of the motion for summary judgment precluded the presentation of such proof. The material facts which were put in issue by the pleadings were the very nature of the respondents' operation and its use of funds.

It must be emphasized that the Seventh Circuit, in affirming the District Court, did not hold the 75% requirement unconstitutional on its face but merely as applied to the respondent. The Court of Appeals specifically declined to decide the reasonableness of the 75% requirement as applied to solicitation by the more "traditional charitable organizations." It went on to say at 500 F. 2d 225:

> "However, for the reasons stated below, the requirement is on its face unreasonable when applied to an organization which by its nature *allegedly* devotes a large portion of its efforts to information gathering and promotion of its objectives, and where its paid solicitors necessarily combine solicitation with other primary activities of the organization." (Emphasis added.)

Thus, the Court of Appeals recognized that the real issue was the reasonableness of the 75% requirement as applied to the respondent. It is further recognized that the character of the organization was merely alleged and not proven. We suggest that the Court of Appeals' opinion in itself was internally inconsistent. Having determined that the only issue was "reasonableness" and that the nature of the organization and its activities was critical, the court nevertheless proceeded to foreclose an inquiry into the reasonableness of the requirement and the nature of the organization by granting the motion for summary judgment.

ARGUMENT.

I.

SCHAUMBURG'S CHARITABLE SOLICITATION ORDINANCE IS CONSTITUTIONAL BOTH ON ITS FACE AND AS APPLIED TO CBE.

The respondents, in their brief, paint with a broad brush what is essentially a narrow question. That question is whether the 75% requirement is unconstitutional on its face or as applied to CBE. The respondents say that this is a classic case for First Amendment protection yet their entire brief fails in any manner to demonstrate how the first Amendment is in any way violated by the ordinance in question.

The fact that CBE purports to be committed to the preservation of the environment does not exempt it from the reasonable requirements of the Schaumburg ordinance. The preservation of the environment may in fact require scientific and technical expertise, but there is nothing in the record to show that CBE has such scientific or technical expertise. We do not suggest that the First Amendment applies only to those who possess such expertise. The fact that CBE is a citizen's organization and allegedly is supported entirely by small contributions by individuals also does not, of itself, bring its door-to-door solicitation activities within the protection of the Frist Amendment.

We have the naked allegations of Mr. Arway's laconic affidavit to the effect that CBE research staff consists, in part, of certain experts, but we do not know whether these experts are, in fact, salaried and if so, what their salaries are, much less how much time they contribute to CBE's activities or what they actually do. There is, of course, nothing in the record to show that Schaumburg's refusal to permit CBE's door-to-door and public solicitation has cut off CBE's principal source of income.

A. The Ordinance Does Not Violate the First Amendment as Applied to CBE's Activities.

Nowhere does the Constitution or the decisions of this court indicate that the First Amendment removes from local governments their police power to protect their citizens from crime and undue annoyance by regulating soliciting and canvassing. As this court has recently recognized in *Hynes* v. *Mayor of Oradell,* 425 U. S. 619, 48 L. Ed. 2d 243: "There is of course no absolute right under the Federal Constitution to enter on the private premises of another and knock on a door for any purpose . . ."

In their brief, the respondents place great reliance upon *Schneider* v. *Irvington,* 308 U. S. 147 (1939) and *Cantwell* v. *Connecticut,* 310 U. S. 296 (1940). Both cases involve the religious freedom of Jehovah Witnesses who were canvassing door-to-door, distributing literature, and soliciting contributions. Such activities were an integral part of the Witnesses' religious belief and practice. We have previously distinguished these cases in our brief. We pointed out that in these cases as in *Martin* v. *Struthers,* 319 U. S. 141, this court determined that the ordinances in question involved administrative discretion without standards. The court considered *Cantwell* at length in the *Oradell* case and clearly distinguished *Schneider* and *Martin.* Those cases involved ordinances which required permits without standards and vested unbridled discretion in an administrative officer or simply prevented canvassing completely. The Schaumburg ordinance is not subject to those infirmities.

In *Schneider* this court recognized that unbridbled discretion had been placed in police authorities to determine who could canvass. The court at 308 U. S. 147, 164 said:

> "In the end his liberty to communicate with the residents of the town at their homes depends upon the exercise of the officer's discretion."

The court insisted that a municipality cannot require all those who wish to disseminate ideas to present them first to police

authorities for their consideration and approval "with a discretion in the police to say some ideas may, while other may not, be carried to the homes of citizens; some persons may, while others may not, disseminate information from house to house." The court, however, said at 165:

> "We are not to be taken as holding that commercial soliciting and canvassing may not be subjected to such regulation as the ordinance requires."

It should, of course, be emphasized that the Schaumburg ordinance is netural on its face and neutral in its administration. Neither the police authorities nor the Village Board purports to pass upon the nature of the ideas sought to be disseminated. All organizations, regardless of their point of view, are treated equally. Nobody is censoring the views of the CBE. The ordinance sets forth clear standards which, when followed, require the issuance of a permit.

Leaving aside the question of the particular nature of the religious solicitation involved in *Schneider,* it is clear that *Schneider* is not authority for holding that the municipality is without authority to enact an ordinance with precise and strict standards which do not involve the exercise of discretion or a power to censor any ideas. The Village is not involved in legislative preference or the imposition of its beliefs respecting matters of public convenience. It is instead attempting to protect citizens from uninvited and unwanted disturbance in the most private of all sanctuaries, the home.

The case of *Cantwell* v. *Connecticut,* 310 U. S. 296 also dealt with the exercise of freedom of religion. In that case, the court clearly did not hold that the type of regulation present here would in any manner violate the First Amendment. As a matter of fact, this court carefully considered *Cantwell* in the *Hynes* opinion as, in fact, supporting municipal authority to regulate solicitation. The statute in *Cantwell,* as construed, vested total and unrestricted discretion in the Secretary of the Public Welfare Council of Connecticut to issue a permit. He was empowered

to determine whether the cause was in fact a religious one and he was not to issue a certificate as a matter of course. Here again, was a situation in which an administrative officer was granted authority to act purely upon his own discretion without standards.

The respondents misstate the thrust of the court's opinion in *Cantwell* when, in their brief, they say that the law in question was not a regulation, but a prohibition. The decision was based upon the unbridled discretion vested in the Secretary of the Public Welfare Council to determine whether the cause was a religious one, was a bonafide object of charity, and whether it conformed to reasonable standards of efficiency and integrity.

The ordinance in *Martin* v. *Struthers,* 319 U. S. 141 (1943) was a total prohibition on the distribution of handbills, circulars, or other advertisements by going from door-to-door. The court held the ordinance invalid as applied to Jehovah's Witnesses who went to the homes of strangers in order to distribute leaflets advertising a religious meeting.

Again, it must be emphasized that the Schaumburg ordinance is not a prohibition on door-to-door distribution of literature or dissemination of ideas. It is a means of protecting the citizens of the community from individuals who are, in fact, soliciting funds for organizations purportedly charitable in character, but utilizing a substantial portion of those funds for non-charitable purposes. There is nothing in the Schaumburg ordinance that would have prohibited Thelma Martin from going from door-to-door and delivering a leaflet advertising a religious meeting.

This court has recognized in *Hynes* and *Breard* that the Constitution, and most particularly the First Amendment, does not give unbridled license for any person to go on the private premises of another regardless of the political or religious nature of the doctrines sought to be disseminated. In keeping with this court's opinion in *Hynes,* the Schaumburg ordinance is a valid exercise of the police power. It is a restriction which is applied in a manner so as not to intrude upon the rights of free speech.

The ordinance is in fact reasonably and narrowly drawn and the respondents' argument to the contrary is without merit.

B. The Schaumburg Ordinance Is Valid Even if Strict Scrutiny Is Applied.

The respondents argue that the Village here seeks to act as a surrogate for the protection of its residents against canvassing. The respondents ignore the fact that the ordinance in question relates to solicitation of funds for "charitable" purposes. It does not seek in any manner to prevent the exercise of freedom of speech. It does not constitute prior restraint on speech. It simply requires that those who go from door-to-door or utilize the public streets for the solicitation of funds for a purported charitable purpose must in fact utilize a substantial portion of those funds for the charitable purposes for which the organization was created.

To argue as the respondents do that the Village is without authority to protect its citizens from misrepresentation in solicitations in the name of charity is to fly in the face of this court's repeated opinions to the contrary. It is absolutely true that an organization which fails to meet the requirements of the ordinance cannot get a permit to solicit contributions on the public streets or from door-to-door as a "charitable" organization. We suggest that it is an exercise in semantics, however, to label the ordinance as a "prohibition" rather than a regulation.

The Village has the unquestioned authority to make certain that those who intrude upon the privacy of its citizens in the name of charity are in fact what they purport to be. The ordinance does not give to the Village the right to decide whether or not an organization should be allowed to solicit because of the nature of its charitable objectives. It enables the Village to protect its citizens from those who are using the guise of charity to commit potential nuisances and disturb the citizens in the quiet enjoyment of their homes.

The Village Board of the Village of Schaumburg constitutes the elected representatives of its citizenry. It has adopted the ordinance in question as an exercise of its legislative discretion. The ordinance was adopted because of the needs and demands of the citizens. It was adopted in response to a serious and continuing problem in the community. We suggest that if the community does not wish such protection, the Village Board, in response to that opinion, would act expeditiously to repeal such an ordinance. We suggest that it was not up to a Federal Court to prohibit the Village from exercising its lawful legislative discretion.

The respondents argue that solicitation by CBE is completely prohibited if it fails to secure a permit. An individual who fails to secure a driver's license is prohibited from driving a motor vehicle. To argue that failure to comply wtih reasonable regulations intended to protect the public constitutes a violation of Constitutional rights is to ignore the entire system of police power regulation which makes possible a reasonably orderly and safe community.

The test of determining whether at least 75% of the proceeds of the solicitation will be used directly for the charitable purposes of the organization can be met by the submission of a certified audit. The State itself requires such a certified audit. But the Village does not insist on an audit, but any other alternate comparable evidence that may demonstrate the facts. We suggest that as the *National Foundation* case indicates, it is not unreasonable to require that when the public streets and the private domiciles of the Village's citizens are to be used for an uninvited solicitation of funds, the proceeds should at least be substantially utilized for the charitable purposes involved.

The respondents insist that First Amendment rights must be judged by rigorous standards; we agree. We do not believe that a fair reading of the First Amendment however includes an unrestricted Constitutional right to solicit funds for charitable purposes by going from door-to-door. In *Hynes* v. *Mayor of*

Oradell, 426 U. S. 610, 48 L. Ed. 2d 243, this court at page 616 considered various cases involving attempts by municipalities to regulate canvassing and soliciting. The court said:

> "But in these very cases, the court has consistently recognized a municipality's power to protect its citizens from crime and undue annoyance by regulating soliciting and canvassing. A narrowly drawn ordinance, that does not vest in municipal officials the undefined power to determine what messages residents will hear, may serve these important interests without running afoul of the first amendment."

We suggest that our ordinance is in fact narrowly drawn. The ordinance in question does not constitute a prior restraint on expression. It regulates the circumstances under which persons seeking money may go from door-to-door and use the public streets of the community. The protection of the public from unwanted and unsolicited disturbances by persons who are utilizing the solicitation funds for other than charitable purposes does not constitute any threat to "indispensable democratic freedoms secured by the First Amendment."

We do not contend that the Village has the authority to enact an ordinance which would unduly infringe freedom of speech. The ordinance in question simply does not constitute the infringement of any protected freedom. Incidentally, it should be emphasized *Schneider* involved canvassing which was an integral part of the religious beliefs of the individuals involved. To equate such protected conduct with the paid solicitors of CBE is to do violence to the concept of religious freedom.

The cases cited by the respondents in their brief simply do not lend any credence to the concept that an ordinance regulating the solicitation of funds is subject to strict scrutiny. But even if the test of strict scrutiny is applied, the ordinance in question here meets that test.

The *Bates* case which sanctioned commercial advertising by lawyers and relied upon the First Amendment is cited by the

respondents. Legal advertising, of course, is not the issue here. The Village of Schaumburgh has not attempted to prevent CBE from advertising and soliciting funds through the mails or by radio, television, or any one of the myriad other methods by which modern fund-raising is carried on. What it seeks to do is merely require that charitable contributions obtained by solicitation in the Village be used for charitable purposes. Such a simple and forthright objective, when its operation is confined to the narrow area encompassed by this ordinance, is not violative of anything which this court has said in the *Bates* case or any other decisions cited by the respondents.

The *Virginia Pharmacy Board* case involves advertising the price of drugs. It clearly has no relevance to the issues in the case at bar. The remarks about *Breard* contained in *Virginia Pharmacy* have to do with the application of the First Amendment to purely commercial speech. We recognize that the court has extended the First Amendment to some commercial as well as non-commercial speech; but, this court has not chosen to overrule *Breard* and as recently as in the *Lehman* case, has asserted its validity and relied upon it. Again, we must emphasize the Schaumburg ordinance is not intended nor structured to interfere with anyone's freedom of speech. To the extent that *Breard* recognizes that door-to-door solicitation is properly subject to municipal regulation, it remains applicable to the case at bar.

In the recent case of *Friedman* v. *Rogers*, ... U. S. ....., 59 L. Ed. 2d 100 (1979), this court recognized that *Virginia Pharmacy* and *Bates* did not mean that commercial speech was free from regulation under the First Amendment. The court emphasized that restrictions on time, place and manner of expression are permissible and that untruthful, deceptive or misleading speech is not protected by the First Amendment. At 59 L. Ed. 2d 100, 109, the court said:

> "In both Virginia Pharmacy and Bates, we were careful to emphasize that '(s)ome forms of commercial speech reg-

ulation are surely permissible.' Virginia Pharmacy, supra, at 770, 48 L Ed 2d 346, 96 S Ct 1817; accord, Bates, supra, at 383, 53 L Ed 2d 810, 97 S Ct 2691, 51 Ohio Misc 1, 5 Ohio Ops 3d 60. For example, restrictions on the time, place or manner of expression are permissible provided that 'they are imposed without reference to the content of the regulated speech, that they serve a significant governmental interest, and that in so doing they leave open ample alternative channels for communication of the information.' Virginia Pharmacy, supra, at 771, 48 L Ed 2d 346, 96 S Ct 1817. Equally permissible are restrictions on false, deceptive, and misleading commercial speech.

> 'Untruthful speech, commercial or otherwise, has never been protected for its own sake. Gertz v. Robert Welch, Inc. 418 US 323, 340, (41 L Ed 2d 789, 94 S Ct 2997) (1974); Konigsberg v. State Bar, 366 US 36, 49, and n 10, (6 L Ed 2d 105, 81 S Ct 997) (1961). Obviously, much commercial speech is not provably false, or even wholly false, but only deceptive or misleading. We forsee no obstacle to a State's dealing effectively with this problem. The First Amendment, as we construe it today, does not prohibit the State from insuring that the stream of commercial information flows cleanly as well as freely.' Virginia Pharmacy, supra, at 771-772, 48 L Ed 2d 346, 96 S Ct 1817; accord, Bates, supra, at 383, 53 L Ed 2d 810, 97 S Ct 2691, 51 Ohio Misc 1, 5 Ohio Ops 3d 60."

This court in *Friedman* cited *Ohralik* v. *Ohio State Bar Association,* 436 U. S. 447, 56 L. Ed. 2d 444, 98 S. Ct. 1912 (1978) in recognizing the power of the state to regulate activities which were commercial in nature even though speech was involved. At page 455, the court said:

> "Expression concerning purely commercial transactions has come within the ambit of the Amendment's protection only recently. In rejecting the notion that such speech 'is wholly outside the protection of the First Amendment.' Virginia Pharmacy, supra, at 761, 48 L Ed 2d 346, 96 S Ct 1817, we were careful not to hold 'that it is wholly undifferentiable from other forms' of speech. 425 US, at 771 n 24, 48 L Ed 2d 346, 96 S Ct 1817. We have not discarded the 'common-sense' distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech. Ibid. To require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech. Rather than subject the First Amendment to such a devitalization, we instead have afforded commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of noncommercial expression.
>
> Moreover, 'it has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed.' Giboney v. Empire Storage & Ice Co. 336 US 490, 502, 93 L Ed 834, 69 S Ct 684 (1949)."

The respondents seek to transform what is a regulation of soliciting for financial contributions into an attack on freedom of speech. The ordinance clearly imposes no unconstitutional burden on the exercise of such a right. The ordinance in question is a reasonable exercise of police power based upon the needs of the community and is narrowly drawn in order to protect the constitutional rights of all.

C. The Schaumburg Ordinance Does Not Violate the First Amendment.

The respondents argue that regardless of the measuring stick applied, the Schaumburg ordinance violates the First Amendment. From what has been said above, it is clear that the ordinance is, in fact, narrowly drawn, does not grant unbridled

discretion to an administrative officer, and in no way impinges upon the First Amendment.

The arguments advanced by the respondent, in fact, are convincing evidence as to why an evidentiary hearing should have been held in this matter to test the reasonableness of the ordinance as applied to CBE. There is no evidence of the exercising of any rights protected under the First Amendment. The character of the information disseminated is a matter of proof. The Village has stated clearly it had no knowledge sufficient to assess the validity of the allegations, respecting the activities of the respondents. It alleged affirmatively that its funds in fact were primarily for the salaries and benefit of its employees. These were matters which go to the very heart of the controversy and should have been subjected to the rigor of a trial and cross-examination.

Further reference is made to salaries of the in-house research staff. The pleadings fail to indicate whether or not these are "dollar-a-year men" or what the character of their employment is for CBE. The mere fact that individuals purporting to have such expertise were alleged to be on the payroll in an affidavit submitted as an attachment to a reply memorandum of law, certainly is not conclusive evidence of what the factual situation is. The fact that attorneys' fees and advertising expenses are included as part of "administrative expenses" is not per se unreasonable. We are entitled to ascertain the nature of such advertising expenses and attorneys' fees.

It is, of course, not true that this ordinance keeps any Schaumburg resident from hearing the message of CBE. It merely requires that CBE meet the reasonable standards which would permit it to solicit funds in the Village.

The respondents also argue at length with respect to the effect on other organizations and reference is made to an amicus brief which this court has not authorized. Reference is made to an article in an obscure publication by an unknown author whose credentials and conclusions no where appear in the

record. The fact of the matter is that on a trial of this cause, the Village would be prepared to show that a substantial number of charitable organizations, some nationwide in scope, have easily met the requirements of the Schaumburg ordinance and, therefore, automatically received the necessary permit.

The records of the Village of Schaumburg indicate that numerous national and local organizations have had no problem in meeting the requirements of the ordinance including the 75% requirement at issue here. Among the best known of such organizations are The City of Hope, The United Cerebral Palsy Association of Chicago, The Heart Association of North Cook County, the American Lebanese Syrian Associated Charities, Inc. (St. Jude Hospital), The National Foundation March of Dimes, The Juvenile Diabetes Foundation, The American Cancer Society, and The Salvation Army. Included as an appendix to this brief is a partial list of the best known organizations which have met the tests of this ordinance and the date of their original approval. It should be noted that since the District Court's original order, the Village has not been enforcing the section in question.

In addition to these major organizations, a plethora of local charities, both large and small, have complied with the requirements of the ordinance and particularly with the controverted 75% requirment.

Contrary to statements which appear in the respondents' brief, The American Cancer Society financial statements indicated that under the terms of the Schaumburg ordinance, the adminstrative costs of the American Cancer Society of Northern Illinois amounted to approximately 17% of the revenues. The Juvenile Diabetes Foundation spent 10% for administrative costs. In each instance, these major charitable organizations had no problems in submitting financial statements indicating clearly that more than 75% of the funds collected were used for charitable purposes. The Village was prepared to present this evidence and more relating to the reasonableness of the 75% requirement, but was precluded from doing so by the summary judgment.

The respondents' arguments that this ordinance amounts to a prohibition or is unreasonable is thus without foundation. That numerous charitable organizations with a variety of objectives have meet the requirements and have received permits is a factual refutation of the unsupported arguments contained in the respondents' brief. In any event, we are not prepared to accept the respondents' arguments based upon an obscure magazine article that the ordinance is arbitrary because it requires that the funds collected be devoted to the purpose for which the charitable organization was created. The history of the ordinance demonstrates conclusively that it has not barred legitimate charitable solicitation in Schaumburg.

The respondents also argue that the ordinance somehow creates a conclusive presumption of fraudulent fund-raising. The ordinance, of course, does no such thing. It simply sets up definite and reasonable conditions which must be met it an organization is to avail itself of public solicitation for funds in a purportedly charitable cause. There is, in fact, no evidence in the record that this ordinance operates to deprive the smaller charity of a right which is given to a larger organization. It would appear that organizations without extensive overhead or large fixed costs will more likely fall within the standards of the ordinance, rather than the kind of top-heavy professional philanthropies that sought to file their amicus briefs in this cause.

The history of the Schaumburg ordinance demonstrates conclusively that small charitable groups have had no problems in the Village. Among those who have solicited funds, under the ordinance, were such groups as the Schaumburg High School VIP Club (a parents' organization), The Golden Knights (a drill team), St. Peter's Luthern School, and the Schaumburg Athletic Association. These organizations, of course, do not rely on high priced paid solicitors and had no problems in meeting the Schaumburg ordinance.

CBE apparently admits that it relies upon its paid canvassers but it clearly does not indicate that to the general public. Instead,

CBE offers itself as an organization dedicated to preserving the environment rather than a fund-raising mechanism for the benefit of its canvassers and a few professional administrators.

It is hardly likely that the 25% limit hits particularly hard at new and unpopular causes. In fact, there is nothing in the record to support this contention and as a matter of logic, the facts are probably contrary. The fact that canvassers for an unpopular cause may have to be paid relatively high salaries, of course, has nothing to do with the validity or reasonableness of the ordinance in question.

The respondents classify themselves as a public action group which apparently incurs high "administrative costs." They classify as "politically difficult" the issue of pollution control. To favor improving the environment is as politically difficult as favoring motherhood and apple pie. The fact that CBE may not receive large corporate or foundation donations does not bear upon the legality of an ordinance which on its face is purely neutral.

The respondent seeks to cloak itself in the guise of a citizen supported organization that advocates political opinions unpopular with established interests. There is nothing in the record to indicate that characterization as a correct one. The Village has no intent or desire to in any way interfere with the advocacy of political opinions of any character. That is not the purpose nor the effect of the ordinance in question. The Constitution does not require that the citizens of Schaumburg be subjected to the invasion of their homes by a fund-raising group simply because the group styles itself as a "citizen supported organization that advocates political opinions unpopular with established interests." The First Amendment makes no distinctions with respect to its application, but it is not to be used as a subterfuge to frustrate the reasonable exercise of the police power.

D. The Ordinance Is Narrowly Drawn.

Schaumburg's ordinance is sufficiently narrow to sustain its constitutionality. The principle that a municipality has the right to require solicitors to establish their identity and their authority to act for the cause which they purport to represent is beyond question. In *Hynes* v. *Mayor of Oradell,* 425 U. S. 610, 48 L. Ed. 2d 243, this court reviewed ordinances dealing with house-to-house canvassers and solicitors and commented upon the significance of the various cases. At page 618, the court said:

> "In reaching these results, the Court acknowledged the valid and important interests these ordinances sought to serve. In Martin, supra, at 144 87 L Ed 1313, 63 S Ct 862, Mr. Justice Black writing for the Court stated:
>
> > 'Ordinances of the sort now before us may be aimed at the protection of the householders from annoyance, including intrusion upon the hours of rest, and at the prevention of crime. Constant callers, whether selling pots or distributing leaflets, may lessen the peaceful enjoyment of a home as much as a neighborhood glue factory or railroad yard which zoning ordinances may prohibit . . .
> >
> > In addition, burglars frequently pose as canvassers, either in order that they may have a pretense to discover whether a house is empty and hence ripe for burglary, or for the purpose of spying out the premises in order that they may return later. Crime prevention may thus be the purpose of regulatory ordinances.'
>
> As Mr. Justice Black suggested, the lone housewife has no way of knowing whether the purposes of the putative solicitor are benign or malignant, and even an innocuous caller 'may lessen the peaceful enjoyment of a home.' Ibid. In his view, a municipality 'can by identification devices' regulate canvassers in order to deter criminal conduct by persons 'posing as canvassers,' id., at 148, 87 L Ed 1313, 63 S Ct 862, relying on the Court's statement in Cantwell, supra, at 306, 84 L Ed 1213, 60 S Ct 900, 128 ALR 1352:

> 'Without doubt a State may protect its citizens from fraudulent solicitation by requiring a stranger in the community, before permitting him publicy to solicit funds for any purpose, to establish his identity and his authority to act for the cause which he purports to represent.' "

Thus the court has explicitly recognized the vital municipal interests at stake. The argument of the respondent that the Village has, by the ordinance in question, created a conclusive presumption that any organization devoting more than 25% of its funds to other than charitable purposes is a fraud, simply is irrelevant to the issues. Clearly the prevention of fraud is a proper objective of ordinances restricting purportedly charitable solicitations, but it is not the only basis for the exercise of the police power.

Other valid objectives include the protection of peaceful enjoyment of one's home and the basic right to be left alone. Certainly the Village has the right and the authority to extend the right to solicit for charitable purposes only to those organizations which in fact devote a substantial portion of the funds received to the charitable purpose for which the group is organized.

The respondents suggest that there is no reason why 25% is an appropriate demarcation. Suffice it to say that the Circuit Court of Appeals in the case of *National Foundation* v. *City of Ft. Worth,* 415 F. 2d 41, found that a 20% figure was an appropriate demarcation. The General Assembly of the State of Illinois in its charitable solicitation statute has also chosen a 25% line of demarcation. We suggest that the 75% requirement is a reasonable exercise of legislative discretion. Undoubtedly, the respondents would prefer that 100% of the proceeds of solicitation should go to their "administrative" expenses. It is up to the municipality to draw the line.

The very fact that a plethora of charitable organizations, both large and small, have been able to operate freely and lawfully

within the 75% requirement of the Schaumburg ordinance is ample proof of the reasonableness of that requirement. At the very least, the question of reasonableness was not to be decided on a motion for summary judgment. One pragmatic test is whether or not charitable organizations can, in fact, meet the requirement in question. The history of the ordinance indicates conclusively that this requirement can be met and has been met without undue difficulty.

The citizens of Schaumburg are thus assured that when a stranger knocks on their doors and asks for money, the charitable purpose for which the funds are asked will in fact be the beneficiary.

The respondents in their brief go beyond the record to refer to a study in something called, "Philanthropy Monthly" and also make reference to the fact that numerous voluntary organizations have sought to enter the case as amicus curiae. The fact that the Coalition of National Voluntary Organizations includes many organizations which are actively soliciting in Schaumburg under the provisions of the Schaumburg ordinance gives lie to the very argument that the respondents and the amicus seeks to make.

Nor are we impressed with the fact, if it is a fact, that the American Institute of Certified Public Accountants has proposed a discussion draft of accounting principles and reporting practices for non-profit organizations. Here again, the respondents are seeking to rely upon material not in the record and having no relevance to the issues before the court.

The respondents continue to raise a strawman when they argue that the Village has shown no connection between the percentage of costs going to administrative expenses and the existence of any deception or fraud on the part of the organization. It would appear obvious on its face that a so-called "charitable organization" is practicing deception if the organization simply uses the charitable cover in order to raise funds for the personal benefit of the organization's employees, be they

paid canvassers or office administrators. The ordinance may exclude organizations like CBE simply because CBE is not a legitimate charitable organization. The ordinance clearly does not exclude large numbers of major charitable organizations.

The respondents seek to argue that the ordinance creates a permanent and irrebuttable presumption that an organization is fraudulent if it devotes more than 25% of its solicitation receipts to non-charitable purposes. The Village is not in the business of making such judgments. It is, however, concerned that those who assume the role of representatives of charitable groups in order to solicit funds from the Village's citizens, do in fact represent organizations that devote a substantial majority of their funds to legitimate charitable purposes. Such identification and authority is well within the guidelines laid down in *Cantwell* and in *Hynes*. An organization such as CBE may well qualify as a "charitable" organization for certain purposes. The fact that it does not apparently so qualify under the Schaumburg ordinance does not render the Schaumburg ordinance invalid, but merely raises questions as to the bonafides of CBE.

The respondents again cite *Schneider* but ignore the fact that the holding in *Schneider* is that the ordinance there gave the police arbitrary power to determine what causes could canvass and solicit door-to-door. The Schaumburg ordinance, whether it be applied to St. Peter's Lutheran Church School, the American Cancer Society, a Schaumburg high school parents' group, or the Heart Association, does not pick and choose between the issues for which canvassing and soliciting can take place.

Again, it must be emphasized that the Village is not restricting the rights of any citizens who want to receive CBE's message and to contribute. Such citizens are, of course, free to invite CBE's representatives to their home, purchase CBE's materials, or participate fully in any purported environmental program sponsored by CBE. The thrust of the Schaumburg ordinance is merely directed at the solicitation of funds in an indiscriminate manner by an organization which devotes more than 25% of the proceeds of its solicitation to other than charitable purposes.

The respondents' argument that a "trespass-after-warning" statute would be proper flies in the fact of the facts of life. It ignores the disturbing factors of the unsolicited knock on the door, the fears of the lone housewife, and the opportunity for fraudulent misrepresentations which are the very evils the ordinance in question is aimed at. The experience of the community well discloses that solicitors whose income depend upon the funds which they raise are not reluctant to ignore the "no solicitors" signs. The realities of the situation are that the average citizen is not likely to pursue the rather laborious process of filing a complaint and appearing in court for violation of a trespass ordinance. The concept that the trespass law or criminal sanctions for fraudulent misrepresentation are adequate remedies to a prevalent nuisance is illusionary.

This court in *Breard* v. *Alexandria,* 341 U. S. 622 at 641 noted an argument that freedom of speech and freedom of the press were impaired by a prohibition against house-to-house canvassing. The court at page 644 said:

> "Subscriptions may be made by anyone interested in receiving the magazines without the annoyances of house-to-house canvassing. We think those communities that have found these methods of sale obnoxious may control them by ordinance. It would be, it seems to us, a misuse of the great guarantees of free speech and free press to use those guarantees to force a community to admit the solicitors of publications to the home premises of its residents. We see no abridgement of the principles of the First Amendment in this ordinance."

The respondents apparently concede that a "Green River ordinance" would be constitutionally valid and not impair freedom of speech or violate the First Amendment. The adoption of a Green River ordinance, of course, is nothing more nor less then the same exercise of the police power which is at issue here. There would appear to be no constitutional difference between an ordinance adopted by a municipality based on a "trespass-after-warning" concept and the kind of regulation here

involved. In each instance, the municipality is using its police powers to restrict what the respondents apparently feel is the exercise of the freedom of speech. The prohibition on canvassing here actually does not substitute the judgment of the community for the judgment of the individual householder. The individual householder is still free to contribute to CBE and to participate in its programs if he so desires.

The thrust of the respondents' argument is really the claim that any group which purports to be charitable in nature has an unrestricted right to solicit funds within any municipality. Such a conclusion flies in the face of this court's recognition in *Hynes* that there is no constitutional right to enter on the private premises of another and knock on a door for any purpose. The fact that there may be statutes against trespass and fraud does not remove from the municipality the right to exercise its legislative discretion in a manner calculated to protect the important municipal interests at stake. The Schaumburg ordinance is clearly drawn with narrow specificity. It is not arbitrary or unreasonable on its face or as applied.

E. Schaumburg's Ordinance Is Supported by Applicable Case Law.

In our original brief we cited substantial authorities in support of the proposition that the ordinance was valid under the municipal police power and did not deprive the respondent of its First Amendment rights. Among those cases were *Hynes* v. *Mayor of Oradell,* 425 U. S. 610, 48 L. Ed. 2d 243 (1976); *National Foundation* v. *City of Ft. Worth,* 415 F. 2d 41 (1969) cert. denied, 396 U. S. 1040, 90 S. Ct. 688, 24 L. Ed. 2d 684 (1970); *Tinker* v. *Des Moines Community School District,* 393 U. S. 503, 21 L. Ed. 2d 731 (1969); *Lloyd Corp.* v. *Tanner,* 407 U. S. 551, 33 L. Ed. 2d 131 (1972); *Grayned* v. *City of Rockford,* 408 U. S. 104, 33 L. Ed. 2d 222 (1972); *Rowan* v. *United States Post Office,* 397 U. S. 728, 25 L. Ed. 2d 736 (1970); *Cohen* v. *California,* 403 U. S. 15, 29 L. Ed. 2d 284

(1971); *Lehman* v. *City of Shaker Heights,* 418 U. S. 298, 41 L. Ed. 2d 770; and *Breard* v. *Alexandria,* 341 U. S. 622, 95 L. Ed. 1233 (1951). These cases involved questions of the application of the First Amendment to governmental action of the nature contained in the Schaumburg ordinance here in question.

We also cited extensive authorities in support of the proposition that the ordinance in question was not unconstitutional because of vagueness. They included *Broadrick* v. *Oklahoma,* 413 U. S. 601, 37 L. Ed. 2d 830 (1973); *Grayned* v. *City of Rockford,* 408 U. S. 104, 33 L. Ed. 2d 222 (1972); and *Arnett* v. *Kennedy,* 416 U. S. 134, 40 L. Ed. 2d 15 (1974).

In their reply brief, the respondents content themselves with an attack on the *National Foundation* case and upon a decision of the Illinois Appellate Court which involved the State of Illinois Charitable Act. The other cases, with the exception of *Hynes* and *Breard,* are totally ignored in the respondents' brief.

The respondents seek to distinguish away the *National Foundation* case largely on the ground suggested erroneously by the Court of Appeals in its opinion. The respondents argue that the *National Foundation* case was based upon the fact that the Ft. Worth ordinance did not create a fixed percentage requirement and that the ordinance was flexible. An examination of the opinion, however, indicates that this was not the basis for the court's decision. In the *National Foundation* case, the court cited substantial authority in support of its statement at page 45:

> "No constitutional right exists to make public solicitation of funds for charity. The reasonable regulation of charitable organization is within a government's police power."

The court went on to say:

> "As an incident to the right of a city to regulate the use of its streets by solicitors and as an element of the protection a city may afford its citizens, a city may reasonably require of one who wishes to solicit that he furnish it with a statement of the past and expected receipts and costs of collection of the funds solicitated within its limits and to deny permission to solicit if the cost of collection is excessive."

The court recognized that the burden was on the plaintiff to establish that the ordinance was unreasonable.

The respondents further seek to distinguish the *National Foundation* case because it was decided in 1969 before *Hynes.* The fact of the matter is, of course, that this court denied certiorari in the *National Foundation* case, 396 U. S. 1040, 24 L. Ed. 2d 684. To say that the Fifth Circuit's decision rested on the fact that the Ft. Worth ordinance did not create a fixed percentage requirement is an absolute misreading of the ordinance and the facts in the case. The ordinance provided that a cost in excess of 20% of the amount of collections shall be deemed to be unreasonable.

The respondents' treatment of *People ex rel. Scott* v. *Police Hall of Fame,* 60 Ill. App. 3d 331, likewise overlooks the holding of that case which is critical to the issues in this matter. The statute in that case required the application of 75% of gross receipts toward charitable purposes as therein defined. The respondents seem to find comfort in the fact that the definition of "gross receipts" was different than the criteria set forth in the Schaumburg ordinance. That is not the critical point in the opinion. A specific First Amendment challenge to the provision in the state statute was made in the *Scott* case. Again it was argued that any limitation of that nature violated the First Amendment regardless of the formula used to determine "gross receipts." The court specifically concluded, however, that the fund-raiser's claim of unconstitutionality did not demonstrate an abridgement of the First Amendment. That was the specific holding at 60 Ill. App. 3d 331, 341. The court went on to say that under the statute, the charities were required to apply 75% of gross receipts toward charitable purposes. At 341 the Court said:

> "That statutory formula was devised to secure protection for the donations given charity by the public and we do not

perceive that it unconstitutionally limits the charities and the exercise of First Amendment rights."

The *Scott* case stands for the principle that there is no constitutional prohibition against requiring that a substantial portion of the donations secured will be devoted to charitable purposes. The point is, that regardless of the formula, the state in the exercise of its police power may impose such a restriction with respect to the purposes for which funds may be put. The respondents' basic argument is that under the First Amendment no such restriction can be imposed. The *Scott* case is a clear holding to the contrary. The constitutional aspects of the *Scott* case can only be read to hold that the First Amendment does not prohibit governmental action to require that monies be in fact devoted to the charitable purposes for which they are purportedly sought.

The respondents also cite the cases of *Carolina Action* v. *Pickard*, 420 F. Supp. 310, involving a preliminary injunction and the same case at 465 F. Supp. 576 involving a permanent injunction. An examination of the cases themselves indicate they give no support to the respondents' position here. The ordinance was held to be vague and over-broad because the term "charitable" was not defined in the ordinance. Moreover, the opinion was based upon the authority of the Seventh Circuit's decision in this matter which is now being reviewed by this court. The judgment in 465 F. Supp. 576 came after an extended evidentiary hearing and was not the result of a summary judgment.

The case of *Swearson* v. *Meyers*, 455 F. Supp. 88, again was a case involving a preliminary injunction. The case was brought by the Unification Church and involved a question of freedom of religion. The District Court in that case properly held that the ordinance in question vested unlimited discretion in the city officials without standards and that the ordinance itself was vague. The ordinance simply gave to the issuing authorities the right to consider a number of facts including the nature of the material distributed, the degree of local membership, the financial standing of the organization and whether prior approval had been requested. But these factors did not mandate the issuance of a permit upon the meeting of any specific standards.

We recognize that District Court cases such as the *Carolina Action* case and the *Swearson* case are hardly adequate authority to guide this court, particularly in light of the extensive authority cited in our original brief. But if the court is interested in District Court decisions, we refer it to a decision of the United States District Court for the Southern District of Ohio, Eastern Division in the case of *International Society for Krishna Consciousness* v. *Evans*, 440 F. Supp. 414 (1977). In that case, the District Court, citing decisions of this court, held that charitable solicitation may not only be restricted, but prohibited without impinging on the right of freedom of speech. Moreover, in that situation, the site in question was public, the state fair grounds, and the organization seeking to solicit was a religious group.

It is clear that based upon the authority presented in our original brief, and most particularly the decisions of this court, the Schaumburg ordinance is in all respects a valid exercise of the police power. It is narrowly drawn; it contains precise standards; it does not vest discretion in an administrative officer or a chief of police. It deals with matters of legitimate municipal concern in a reasonable and proper manner. It does not violate the First Amendment.

II.

THE DISTRICT COURT IMPROPERLY GRANTED SUMMARY JUDGMENT.

A. The Ordinance Is Valid on Its Face and Evidence as to the Nature of CBE's Activities Is Required if the Question of Reasonableness as Applied Is To Be Determined.

The plaintiffs herein filed their amended complaint for declaratory judgment and injunction against the Village on December 7, 1977. On the same date, they filed their motion for sum-

mary judgment. (A-2) The trial court gave defendants fifteen days in which to answer. The Village filed its answer to the amended complaint on December 12, 1977 and filed its answer to the motion for summary judgment on December 15, 1977. On December 23, 1977, the plaintiffs filed an affidavit attached to their reply memorandum of law in support of the motion for summary judgment. (A-2)

In its answer to the motion for summary judgment the Village alleged that there are genuine issues as to the material facts and the plaintiffs were not entitled to summary judgment. (A-4) In its oral opinion, the trial court did not deal with the question as to whether there were controverted issues of fact but merely declared subsection (g) of Section 22-20 invalid. (A-46). In the final judgment order the trial court again did not discuss the question of whether there were material issues of fact but simply declared the section in question "unconstitutional and void on its face." (A-53)

The Court of Appeals attempted to place the respondents in a different cagetory from "the more traditional charitable organizations." It refused to hold the ordinance unconstitutional on its face and as applied to the more traditional organizations, but stated that the requirement is on its face unreasonable when applied to an organization which by its nature "allegedly devotes a large portion of its efforts to information gathering and promotion of its objectives and where its paid solicitors necessarily combine solicitations with other primary activities of the organization." In so holding the Court of Appeals necessarily made assumptions as to the character of the respondents which were unsupported by the record.

We suggest that the motion for summary judgment was not within the rules, because Rule 56(a) of the Rules of Civil Procedure prohibits a motion for summary judgment until twenty days after the expiration of the commencement of the action. The filing of an amended complaint on the same day as the motion for summary judgment clearly violates Rule

56(a). But even if that violation of the rules is ignored it is apparent that the state of the pleadings showed that there were genuine issues of material facts.

We deny, of course, that the ordinance is invalid on its face. The Court of Appeals recognized that the ordinance was not invalid on its face and as applied to most charitable organizations. It had to make assumptions dehors the record in order to determine that CBE was a type of organization which in its view rendered the ordinance unreasonable on its face.

The mere fact that the respondents claim to be a certain type of organization does not prove that the ordinance was therefore unconstitutional. The Village in its answer quite properly claimed it had no knowledge sufficient to form a belief as to the truth of allegations regarding the character of the respondents. The Village further alleged as an affirmative defensive the fact that the organization was primarily devoted to raising funds for the benefit and salary of its employees and that its charitable purposes were negligible as compared with the primary objective of raising funds. The Village further alleged on information and belief that more than 60% of the funds collected had been spent for the benefit of employees and not for any charitable purposes.

Thus, contrary to the statements in the respondents' brief, the Village sought a trial on controverted issues as to the character of the organization. Under Point A of the second section of their brief, respondents say that the Court of Appeals squarely affirmed the District Court finding that the 75% requirement is invalid on its face. While we challenge the validity of the Court of Appeals' opinion, it is clear that that opinion did not squarely affirm the District Court. The District Court's opinion made no distinction between groups of charitable organizations and made no findings with respect to information gathering or other nonfund raising activities of respondent. At the very least, the Court of Appeals should have remanded the cause for the purpose of determining whether in fact the organization

devotes a large portion of its efforts to information gathering and the promotion of its objectives.

We believe that the ordinance is constitutional, both on its face and as applied. Once the Court of Appeals conceded that the reasonableness of the 75% requirement depends on the nature of the organization, it was necessary for a trial to determine whether in fact the nature of the respondents' activities was such as to make the 75% requirement unreasonable.

B. The Village's Request for Trial Is Consistent with Its Position Below.

Contrary to the statements in the respondents' brief, there is a substantial dispute as to whether CBE devotes a large portion of its efforts to information gathering and promotion of its objectives and whether its paid solicitors combine solicitation with other primary objectives of the organization. The Village disputed these facts and by affirmative defense alleged that the purpose of the organization was in fact to raise funds for the primary benefit of its solicitors and other employees.

In characterizing the answer to paragraph 3 of the amended complaint, the respondents ignore that portion of the Village's answer stating that they have no knowledge sufficient to form a belief as to the truth of those allegations. To say that the facts were further fleshed out in Hoellwarth's Affidavit is simply to ignore the language of the affidavit.

The Village in its answer did not make the case one of law and not of fact. The reference to relevancy and materiality had to do with the fact that mere registration with the Attorney General and tax exempt status did not determine the issues in the cause. The allegations that the plaintiffs canvassed to solicit funds was admitted. The purpose for which the organization was organized, of course, was immaterial; what the organization actually did was critical. The trial court erroneously held the ordinance unconstitutional on its face. It did not concern

itself with the question of the organization's actual activities and character. Even under the Court of Appeals opinion the nature of the respondent and its activities is vital to resolution of the issues in this cause.

C. The Village Raised Issues of Fact Before the District Court.

In its answer the Village denied that it acted without legal authority or in an arbitrary or capricious manner in denying the plaintiffs' application for permit. (A-28). The question of whether the Village's action was arbitrary or capricious, of course, is a question of fact. The Village denied that its refusal was without good cause shown. (A-29) The Village denied that the plaintiffs were being subjected to a deprivation of freedom of association or rights to access to the courts or denied their constitutional right. (A-30). The Village denied that the plaintiffs' interests were being irreparably harmed or adversely affected by any acts of the defendant. (A-30) The Village denied that there is any prior restraint or unreasonable interference with the exercise of plaintiffs' rights. (A-31) The Village denied that the permits to solicit were issued at the arbitrary discretion of the Village Board. (A-32)

The Village as affirmative defenses alleged on information and belief that the respondents were primarily devoted to raising funds for the benefit and salary of its employees and that its charitable purposes are negligible as compared with the primary objective of raising funds. It further alleged on information and belief that more than 60% of the funds collected had been spent for the benefit of the employees and not for any charitable purposes. (A-33)

Thus, real and substantial material issues of fact were raised in the pleadings before the District Court. These were all genuine issues for trial. Contrary to the assertion of the respondents in their brief, Rule 56(e) does not require that summary judgment be granted under the circumstances at bar. There is no

doubt that the Village raised before the District Court the issues of fact which were contested. Those issues were clearly spelled out in the pleadings. Rule 56(e) provides that a summary judgment must be granted "if appropriate". As we have indicated in our original brief, and here, summary judgment is clearly not appropriate on the state of the record.

1. CBE's Motion Did Not Show That No Genuine Issues of Material Fact Existed.

The motion for summary judgment alleged merely that there was no genuine issue as to any material fact and the plaintiffs were entitled to summary judgment as a matter of law. (A-39) The affidavit of Hoellwarth set forth that he was employed by the respondent and his duties included the direct supervision and control of the canvassing program. The affidavit set forth that CBE was an Illinois not-for-profit corporation and alleged its stated corporate purposes. The affidavit went on to allege that CBE was in good standing with the Charitable Trusts Division of the Office of the Illinois Attorney General, had been granted tax exempt status and tax deductible status by the IRS.

The Hoellwarth affidavit further alleged that the respondent employed a staff of canvassers who were registered with the Attorney General. The affidavit contained the conclusion that CBE is almost entirely supported by small contributions and that door-to-door canvassing was the single most important source of funds for its program. Hoellwarth also stated in his affidavit that in the door-to-door canvass, representatives distributed informative pamphlets and answered questions, accepted complaints and accepted contributions.

That is the sum total of the supposed factual background which gave rise to the motion for summary judgment on December 23, 1978. A second affidavit was attached to the plaintiffs' reply memorandum of law in support of its motion in which Arway made reference to the 1975 and 1976 audits and referred to the fact that CBE had an inhouse research staff. (A-43)

We submit that the state of the pleadings simply did not warrant the granting of a summary judgment involving major constitutional principles.

Directly in point is the case of *Smith* v. *City of Manchester*, 460 F. Supp. 30 (1978) where the Court reviewed the question of granting a motion for summary judgment where major constitutional issues are involved. In the *Smith* case, unlike the case at bar, the parties both agreed that the question at issue was a matter of law. At page 36, the Court said:

> [12] Rule 56(c), Federal Rules of Civil Procedure, permits summary judgment only if there are no material issues of fact and the record shows that the moving party is entitled to judgment as a matter of law. *Lashlee* v. *Sumner*, C. A. 6th (1978), 570 F. 2d 107, 111[6]. Although both sides herein appear to agree that this motion involves merely a matter of law, it is well settled in this circuit that a district court should be extremely hesitant to grant summary judgment on important and complex issues, and the adequacy of the record is particularly important where the Court is called upon to decide questions of constitutional law without the benefit of a trial. *Felix* v. *Young*, C. A. 6th (1976), 536 F. 2d 1126, 1134[13] (likewise involving a challenge to municipal ordinances on First Amendment grounds).
>
> A case heard in the federal courts should be determined upon the merits and after an adequate development of the facts. *Oil Chemical & Atom. Wkrs. Union* v. *Delta Refin. Co.*, C. A. 6th (1960), 277 F. 2d 694, 698[4]. Where a case is such that a full inquiry into the facts at trial is advisable for the purpose of clarifying the application of the law, summary judgment is not appropriate. *S. J. Groves & Sons Company* v. *Ohio Turnpike Commission*, C. A. 6th (1963), 315 F. 2d 235, 238[2]. The federal courts must be reluctant to pass upon the constitutionality of a municipal ordinance without the benefit of a trial. *Rescue Army* v. *Municipal Court* (1947), 331 U. S. 549, 575-576, 67 S. Ct. 1409, 1423, 91 L. Ed. 1666, 1681-1682.

Certainly in the context of the First Amendment issues which the Respondent sought to raise, a summary judgment was not warranted based on the record in this case.

2. The Village Raised the Issues Before the District Court on Which It Now Seeks Trial.

The respondents criticize the answer to the motion for summary judgment filed by the Village because the respondents claim it asserted only legal conclusions and denials. The motion for summary judgment contained nothing but the naked conclusion that there were no material issues of fact. The pleadings themselves raised the issues of the material fact. Both in the denials and in the affirmative defenses the nature of CBE and its lack of genuine charitable purpose was sufficiently and clearly raised. We did not wait for appeal to raise the issues. The respondents now chide us for relying on newspaper articles in support of our affirmative defenses. This comes with somewhat poor grace from a party that is impressed by articles published in the "Philanthropy Monthly" and discusses drafts of accounting principles which were not in any manner before the Court. We suggest that Rule 7(a) does in fact permit a reply to the kind of affirmative defenses which were raised in our pleadings. Failure to respond to those affirmative defenses was at respondents' peril.

The respondents further are critical because "the Village used none of the extensive discovery tools available" to develop a factual record to oppose CBE's motion. Here again, that assertion is somewhat hollow in light of the fact that the respondents filed their motion for summary judgment on the same day they filed their amended complaint and the Village was given fifteen days in which to answer. The fact is simply that the Village opposed the summary judgment in a manner totally proper under the circumstances. Its answer raised controverted material issues of fact which could be resolved only by a full trial.

CONCLUSION.

For the reasons set forth herein and in our original brief, we respectfully suggest that the trial court erred in granting the motion for summary judgment and the Court of Appeals erred in affirming that decision. The Schaumburg ordinance both on its face and as applied to CBE is a reasonable exercise of the police power. It does not violate the First Amendment or in any way infringe the constitutional rights of respondents.

We, therefore, respectfully suggest that this Court reverse the Court of Appeals and that Section 20(g) of Chapter 22 of the Schaumburg Code be held to be constitutional on its face and as applied, or in the alternative, that this Court reverse the Court of Appeals, hold the ordinance valid on its face and remand the matter for trial on the question of reasonableness as applied to the respondent.

Respectfully submitted,

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Chicago, Illinois 60603,
312-263-2968,
Attorney for Petitioner.

APPENDIX.

CERTAIN ORGANIZATIONS SOLICITING PURSUANT TO SCHAUMBURG ORDINANCE.

	Date of Original Approval
City of Hope	June, 1974
St. Jude's Hospital	June, 1974
Salvation Army	February, 1975
The Heart Association	January, 1975
American Cancer Society	April, 1974
Juvenile Diabetes	April, 1974
March of Dimes	January, 1975
United Cerebral Palsy	January, 1975
Kidney Foundation of Illinois	February, 1975
Muscular Dystrophy	February, 1975
Cystic Fibrosis	August, 1975
Children's Benefit League	December, 1975
Mental Health Association	April, 1976
American Diabetes Association	September, 1977